

not require the Commission to impose all of the available sanctions within that period.¹⁰⁵

Therefore, the Commission should use expedited procedures only to determine the need for injunctive relief, and it should take more time, if necessary, to develop a complete factual record before deciding to impose forfeitures.

C. The Commission Should Explicitly Incorporate ADR Into Its Section 271 Enforcement Procedures

The Commission also seeks comments on other ways of quickly resolving interconnection disputes, such as employing ADR procedures (NPRM ¶ 107). Rather than short-circuit the BOCs' due process rights by placing the burden of proof on them in complaint proceedings, the Commission should rely heavily on ADR techniques to meet the 90-day deadline. ADR is finding increasing acceptance in civil proceedings as a means of reducing the delay and expense of litigation. ADR includes a variety of approaches, including mediation, binding or non-binding arbitration, mini-trials, fact-finding, and advisory opinions. While the Commission's staff regularly encourages the parties to a complaint proceeding to employ ADR procedures, such procedures are rarely

¹⁰⁵ In contrast, provisions such as Section 271(d)(6), which also impose short procedural deadlines, are more specific about the types of actions that the Commission must take (in the case of Section 271(d)(6), the Commission must approve or deny a BOC request for interLATA authority within 90 days). The term "act" should be construed as providing the Commission with more procedural flexibility. See, e.g., John Kokajko, d/b/a Voyageurs v. FERC, 837 F.2d 524 (1st Cir. 1988)(holding that statutory language requiring FERC to "act" within 30 days does not require the agency to "act on the merits" within that time period). See, also, California Co. v. Federal Power Corp., 411 F.2d 720 (D.C. Cir. 1969); General American Oil Co. of Texas v. FPC, 409 F.2d 597 (5th Cir. 1969).

used. Therefore, the Commission should adopt rules for handling Section 271 complaints that would explicitly incorporate ADR techniques.

For instance, the Commission could provide that a Section 271 complaint must be served by the complainant simultaneously on both the Commission staff and the BOC. A member of the staff should hold a telephonic conference with both parties within a few days for purposes of: (1) defining and narrowing the issues; (2) obtaining stipulation as to undisputed facts; (3) determining the amount of discovery needed to resolve the facts; and (4) deciding on subsequent procedural steps. The staff should give the parties the option at that point of: (1) filing briefs and reply briefs and obtaining a Commission decision on the merits; (2) submitting the matter to mediation or to binding or non-binding arbitration; or (3) requesting an advisory opinion by a mediator or by a member of the Commission's staff.

If the parties could not agree to pursue ADR, the Commission staff could set up a schedule for exchange of discovery and the filing of briefs and reply briefs that could be completed within 60 days of the complaint.

VIII. CONCLUSION

The NPRM in this proceeding seeks to implement the last major prong of the new nationwide telecommunications policy to opening *all telecommunications markets to competition*. After substantially promoting entry into the local exchange market and beginning to open the cable television market to competitive alternatives, the Commission

has properly turned herein to the task of opening the domestic and international long distance market to the BOCs -- previously barred by the MFJ from competing. This task has recently been described by the Commission itself as one of the "three principal goals" of the 1996 Act.

As above, the NPRM begins with an affirmative recognition of the potential public benefits to be secured (NPRM ¶ 6). Nevertheless, there is a real prospect that incumbent providers will seek to use the Commission, its rules and processes to prevent, rather than encourage, new competitive entry. NYNEX urges the Commission to refrain from handicapping these competitive efforts and, instead, to adopt a role of ensuring that effective competition is encouraged under the *pro-competitive, de-regulatory national policy framework* designed by Congress to ensure that the benefits of additional competition are brought into these markets.

Respectfully submitted,

NYNEX Corporation

By: 

Saul Fisher
Donald C. Rowe

1111 Westchester Avenue
White Plains, NY 10604
(914) 644-6993

Its Attorneys

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